

DOCKET NO. A07-773
Waikapū Development Venture
(b)

Status Report Continuation

STAFF
REPORT

ACTION MEETING

October 18, 2023



Daniel E. Orodener, Executive Officer

Submitted: October 13, 2023

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1. EXPLANATION OF PROCEEDING

Status and Progress Report hearings provide the Petitioner an opportunity to update the Commission on progress or problems in compliance with the representations and conditions of the decision and order.

Any decisions by the Commission should be based on good cause (or lack of) shown by the Petitioner for its lack of progress and evidence put on the record. If the Commission finds that WDV is not going to or is not capable of capable of compliance with the 2019 Decision and Order, they may request staff to schedule a hearing for Order to Show Cause proceedings.

AUTHORITY

Pursuant to HAR 15-15-90(c) “The Commission may require the petitioner to submit periodic reports indicating what progress has been made in complying with any conditions that may have been imposed by the commission.”

Pursuant to HRS 205 and HAR 15-15-79(a): “Petitioners granted district boundary amendments shall make substantial progress within a reasonable period, as specified by the commission, from the date of approval of the boundary amendment, in developing the property receiving the boundary amendment. The Commission may act to amend, nullify, change, or reverse its decision and order if the petitioner fails to perform as represented to the Commission within the specified time period.”

Condition 19 of the 2008 Decision and Order Relating to Annual Reports “Petitioner shall timely provide without any prior notice, annual reports to the Commission, the Office of Planning and Sustainable Development, and the County of Maui Planning Department in connection with the status of the Project and Petitioner’s progress in complying with the conditions imposed herein.”

After hearing from the Petitioner and other parties, the Commission decides additional time may be needed to move forward or that there is a reason to believe that Petitioner is non-compliant with representations and conditions in the D&O and set an Order to Show Cause hearing pursuant to HAR 15-15-79 and 15-15-93(b).

2. BACKGROUND INFORMATION

Please note that the background information includes information that involves

Emmanuel Lutheran Church of Maui (“ELC”) due to the interdependence and close relationship with the two projects in the Docket.

Also given the exacerbation of the housing crisis as a result of the Lāhainā fire, it is imperative that projects on Maui move forward as quickly and transparently as possible. Encouragement of developments should be a priority in proceedings.

The proceeding before the Land Use Commission (“LUC”) is to hear a status report by Waikapū Development Venture, LLC (“WDV”). The A07-773 docket originally involved the reclassification of approximately 25.263 acres of land from the State Land Use Agricultural District to the State Land Use Urban District at Wailuku, Island of Maui, State of Hawai‘i, TMK No. 3-5-002:011.

The DBA was granted on March 7, 2008, subject to 23 conditions ([see 2008 Decision and Order](#)).

The Project was anticipated to be completed in three phases, and each phase was anticipated to take 13 months to complete. Condition 2 of the 2008 Decision and Order states

“Petitioner shall develop the Petition Area and complete construction of the Project no later than ten (10) years from the date of the decision and order. If Petitioner fails to complete Project construction within ten (10) years from the date of the decision and order, the Commission may, on its own motion or at the request of any party, file an Order to Show Cause and require Petitioner to appear before the Commission to explain why the Petition Area should not revert to its previous Agricultural classification.”

Petitioner submitted [2016 Annual Report](#)

Petitioner Submitted [2017 Annual Report](#), and the LUC received [County Comments](#)

- The 2017 Annual Report identifies that Emmanuel Lutheran Church was in the process of selling half of the Petition area to Waikapū Development Venture once the land was subdivided.
- The 2017 Annual Report states that WDV’s plan is to develop a 100% affordable and workforce housing project on that property. The WDV project is proposed to have 80 residential units that will be available for sale to qualified individuals earning within 70% to 140% of the Maui area median income.

Please note the following portion of the background information is divided into Petitioners Motions, in this docket numerous motions were made subsequently.

2018 Motion ELC
for Time to Complete
Project

On April 9, 2018, ELC filed its [Motion for Extension of Time to Complete Project](#); Memorandum in Support of Motion; Affidavit of Michael Reiley; Affidavit of William

Frampton; Petitioner’s Exhibits “A” through “F”
(collectively “Motion for Extension”)

On April 27, 2018, The Land Use Commission received [OPSD Response to Petitioner Emmanuel Luther Church of Maui’s Motion for Extension of Time to Complete Project](#)

On July 11, 2019, the LUC Mailed Findings of Fact, Conclusions of Law, [Decision and Order Granting](#) Petitioner ELC’s Motion for Extension of Time to Complete Project and [Motion for Modification](#); COS

2018 WDV Subsequent Motion (1) to be a co-petitioner with Emmanuel Lutheran Church of Maui, or in the alternative (2) to become a Party herein, or in the alternative (3) to intervene

On April 12, 2018, WDV made a [subsequent motion](#) (1) to be a co-petitioner with Emmanuel Lutheran Church of Maui, or in the alternative (2) to become a Party herein, or in the alternative (3) to intervene.

On April 19, 2018, LUC Received [ELC’s Memorandum in Support](#) of Waikapū Development Venture LLC’s Motion to be co-petitioner, or in the Alternative to Become a Party, or in the Alternative to Intervene,

On April 19, 2018, the LUC received [OPSD’s Letter of No Opposition](#) to WDV LLC’s Motion

On April 26, 2018, [County of Maui- Department of Planning’s Statement of No Objection](#) to (1) Emmanuel Lutheran Church of Maui Motion for Extension of Time to Complete Project and (2) Waikapū Development Venture LLC’s Motion to be Co-petitioner; or in the Alternative to Become a Party; or in the Alternative to Intervene.

On May 1, 2018, the [County of Maui Department of Housing and Human Concerns](#) sent a comment letter in support of WDV’s Motion to support the development of affordable housing.

On June 22, 2018 the LUC sent the [Order granting Waikapū Development Venture LLC’s motion to intervene](#)

2018 ELC Motion for Modification

On October 12, 2018, ELC filed a Motion [Motion for Modification; Memorandum in Support of Motion; Affidavit of Michael Reiley; Petitioner’s Exhibit “1”](#)

On November 19, 2018, The OPSD, Submitted their response to [Emmanuel Lutheran Church of Maui’s Motion for Modification](#)

On November 21, 2018, the County of Maui Planning Department filed their [Response to ELC’s Motion for Modification](#)

On July 11, 2019, the LUC Mailed Findings of Fact, Conclusions of Law, Decision and [Order Granting Petitioner ELC’s Motion for Extension of Time to Complete Project and Motion for Modification; COS](#)

The Commission amended Condition Two of the 2008 Decision and Order to read as follows:

“Reversion of District Classification. Petitioner shall develop the Petition Area and complete the construction of the Project no later than twenty (20) years from the date of the decision and order. If Petitioner fails to complete Project construction within twenty (20) years from the date of the decision and order, the Commission may, on its own motion or at the request of any party, file an Order to Show Cause and require Petitioner to appear before the Commission to explain why the Petition Area should not revert to its previous Agricultural classification”

It was further ordered that the foregoing amendments and modifications to the 2008 D&O shall be subject to the following conditions:

1. Petitioner shall complete the initial two phases of the Updated ELC Project within six (6) years of the Commission’s issuance of this Order.
 - Six years from issuance is July 11, 2025
2. Petitioner shall have a CIA of the Petition Area completed prior to Petitioner’s completion of Phase 1 of the Updated ELC Project, and

Petitioner shall adhere to the recommendations of said CIA.

2018 WDV Motion to Approve Sale, Motion to Allow Subdivision, and Motion to Bifurcate

On September 7, 2018, Maui County adopted [Resolution No. 18-150](#) approving with modification the affordable workforce housing project by Waikapū Development Venture LLC, pursuant to section 201H-38, Hawai‘i Revised Statutes. Which states:

“Construction of the Waikapū Development Venture LLC Affordable Workforce Housing Project ("Project") shall commence within two years of the effective date of this resolution. Commencement of construction shall mean the visible start of grading, pursuant to a valid grading permit as needed for the development of the 12.5 acres upon which the 80 residential workforce housing units shall be constructed ("Property"). Waikapū Development Venture LLC shall act in good faith and with its reasonable best efforts to complete construction of the 80 residential workforce housing units, with all related roads and infrastructure, no later than four years after the effective date of this resolution.”

On October 12, 2018, WDV made a [Motion to Approve Sale, Motion to Allow Subdivision, and Motion to Bifurcate](#)

On November 19, 2018, The OPSD, Submitted their response to [WDV’s Motion to Approve Sale; Motion to Allow Subdivision and Motion to Bifurcate](#)

On July 11, 2019, the LUC sent the [2018 Findings of Fact, Conclusions of Law, Decision and Order Granting WDV’s 1\) Motion to Approve Sale of a Portion of the Petition Area; 2\) Motion to Allow for Subdivision of Petition Area; 3\) Motion to Bifurcate; and 4\) Motion for Modification; COS](#)

The Decision and Order approved the sale of a portion of the Petition Area, deleted Condition 20 of the 2008 D&O, granted WDV’s Motion for Modification, amended Condition two (2) of the 2008 Decision and Order, and granted bifurcation.

Accordingly, this docket is henceforth bifurcated into Docket No. A07-773(a) consisting of the findings, conclusions, and conditions applicable to that portion of the Petition Area retained by ELC and into Docket No. A07-773(b) consisting of the findings, conclusions, and conditions applicable to that 12.5-acre portion of the Petition Area to be acquired by WDV.

The Commission Ordered that Intervenor shall record an amendment to the existing Declaration of Conditions Applicable to an Amendment of District Boundary from Agricultural to Urban, recorded in the Bureau of Conveyances of the State of Hawai‘i as Document No. 2008-076764, to reflect the amendment to Condition No. 2, the deletion of Condition No. 20, and the addition of the new condition stated above.

All other conditions to this Commission’s 2008 D&O filed March 7, 2008, shall continue in full force and effect and shall further apply to Intervenor in Docket No. A07-773(b).

2018 WDV Motion for Modification

On October 26, 2018, WDV made a [Motion for Modification; Memorandum in Support of Motion](#) that requested the Land Use Commission issue an order modifying the Findings of Fact, Conclusion of Law, and Decision and Order filed on March 7, 2008. Allowing for use of the Petition Area acquired by WDV to develop workforce housing project, that was previously approved by the County of Maui.

On November 11, 2018, Waikapū Development Venture LLC’s filed their [Errata to Motion for Modification](#).

On November 19, 2018, The OPSD, Submitted their response to [Motion for Modification](#).

On November 21, 2018, the County of Maui Planning Department filed their [Response to WDV’s Motion to Approve Sale; Motion to Allow Subdivision and Motion to Bifurcate](#).

On November 27, 2018, The County of Maui Department of Planning filed their [Errata to Position Statement](#) and

Statement of No Response on WDV Errata to for Modification

On January 31, 2019 the Land Use Commission revived the [WDV Intervenor’s Draft Order for BOTH Intervenor’s 2018 Motions](#)

On July 11, 2019, the LUC sent the [2018 Findings of Fact, Conclusions of Law, Decision and Order](#) Granting WDV’s 1) Motion to Approve Sale of a Portion of the Petition Area; 2) Motion to Allow for Subdivision of Petition Area; 3) Motion to Bifurcate; and 4) Motion for Modification; COS

The Commission granted WDV’s Motion for Modification. Accordingly, the Commission amended Condition Two which reads:

“Reversion of District Classification. Intervenor shall develop the 12.5-acre portion of the Petition Area and complete the construction of the Workforce Housing Project no later than four (4) years from the date of this Order. If Intervenor fails to complete the development within four (4) years from the date of this Order, the Commission may, on its own motion or at the request of any party, file an Order to Show Cause and require Intervenor to appear before the Commission to explain why the land should not revert to its previous Agricultural classification.”

It was further ordered that Intervenor’s description of the HRS 201H Waikapū Affordable Workforce Housing Project in its Application for Affordable Workforce Housing Subdivision (Exhibit E to WDV’s Motion for Modification) is hereby considered to be Intervenor’s representations to the Commission for all purposes, including the application of Condition No. 1 of the 2008 D&O.

Staff contacted former Attorneys for the Petitioner regarding delinquent annual reports, the Petitioners submitted the joint [2018-2023 Annual Report](#), [Attachment 1](#), and [Attachment 2](#) on April 13, 2023. A synopsis of key sections is as follows;

Condition 1)
Compliance with Representations
to the Commission

At present there has not been any development of the ELC Petition Area, except to grub and clear a 10-foot-wide area that is within the ELC Petition Area

WDV intends to develop its 12.5-acre portion of the Petition area in substantial compliance with the description of the HRS 201H Project

Condition 2)
Reversion of District
Classification

The Annual Report states “As noted in 2018, ELC still does not have the ability to begin or complete construction by the March 7, 2018 deadline of ten years”

Due to the Covid-19 Pandemic and current economic conditions, WDV does not anticipate completing construction of the Workforce Housing Project by July 11, 2023

Condition 5)
Highways and Roads

ELC will comply with this condition upon construction of their respective projects. Annual report states “This condition does not apply to WDV.”

2023 Status Report

On April 25, 2023, The LUC Staff sent the [2023 Status Report Letter](#) scheduling a hearing for June 7th, 2023.

On May 12, 2023, The Petitioner filed [2018-2023 AMENDED Annual Report](#), [Attachment 1](#), [Attachment 2](#), and [Attachment 3](#).

On June 7th, 2023, the LUC held a status report hearing for A07-773 Waikapū Development Venture, LLC (b) at the hearing the Commission brought up the following issues to be presented on at the following status report hearing:

- 1) Interviewees in the study provided by Honua Consulting**
 - a. evidence that the interviewees have knowledge and experience in traditional and customary practice relevant to Article 12 and Ka Pa’akai, and reason why they were selected
- 2) Funding from the County Council**
 - a. timeline for determination of funding

- 3) **Go/no go decisions**
 - a. County Subsidy
 - b. 201-H Amendment
 - c. Two-lot subdivision
 - d. Subdivision Infrastructure plans and permitting
 - e. House plan development
 - f. Subdivision infrastructure improvements; County waterline and County sewer
 - g. Construction loans
- 4) **Elimination of park/ green space**
- 5) **Impacts on climate change**
- 6) **Design of housing-** use of photovoltaic energy
- 7) **Information/citation of the Market Study** that identifies people want single-family homes
- 8) **Copies of the agreements with the County**
- 9) **Updates to the TIAR**

As of 10/10/2023 the LUC has not received any written response from the Petitioner in response to these questions.

3. OPSD POSITION

No comments received.

4. COUNTY OF MAUI POSITION

No comments received.

5. STAFF ANALYSIS

Please note that the staff analysis includes information that involves ELC due to the interdependence and close relationship with the two projects in the Docket.

Staff included the Commissions unanswered questions from the first status report hearing. The list of questions is listed in the background information portion of this staff report under section “2023 Status Report”.

Staff’s specific points of concern:

Delay in Development

According to the 2018-2023 Annual Report, at present there has not been any development of the ELC Petition Area. WDV states that it intends to develop its 12.5-acre portion of the Petition area in substantial compliance with the description of the HRS 201H Project.

WDV began extending a 12” county waterline within Waiale Road. Work commenced Aug. 2022 and is expected to be completed in June 2023.

Traffic Impact Report/ Study (“TIAR”)

During a meeting with WDV and LUC Staff on September 14, 2023, WDV indicated that they are willing to update the TIAR.

It was not clear if the study will include impacts from ELC.

If clarity is provided by both WDV and ELC on this matter during the status report, the Commission may include a condition to reflect the outcome of status report hearing.

Financial Capability

LUC Staff notes the work on subsidizing the project. Considering the devastating fire in Lahaina on August 4th, 2023, LUC Staff is concerned about the availability of funding for the project, as County funds may be prioritized elsewhere.

The Commission should ask WDV for a clear statement of financial standing. Where they are in discussions with the County regarding security of funding.

If the Commission finds that ELC is not going to or is not capable of capable of compliance with the 2019 Decision and Order, they may request staff to schedule a hearing for Order to Show Cause proceedings.